Supreme Court, U.S.
FILED

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No.

In the

supreme Court of the United States

October 1996 Term

Robert Lee Avrett, Jr.,

Petitioner

vs.

POLY-AMERICA,INC., STEVEN GRANT ROSS, STEVEN GRANT ROSS,personal capacity, JOAN M. TASKER, JOAN M. TASKER,personal capacity, WANDA WAKELAND, WANDA WAKELAND, personal capacity,EDWARD M. CAVUTO,EDWARD M. CAVUTO,personal capacity, GARY O. BOOTH, GARY O. BOOTH,personal capacity, INTERNAL REVENUE SERVICE, JOHN DOES 1 through 3, JANE DOES 1 through 3,

Respondents

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Robert Lee Avrett, Jr.
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22 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether federal law , as well as clearly established decisions of this Court provide redress for Citizens, and subject matter jurisdiction to federal district courts when citizens sue federal officers for monetary damages when federal officers violate a citizens constitutional rights, and whether the Fifth Circuit Court of Appeals abused it's discretion and denied Fourth, Fifth, and Fourteenth Amenement Due Process to Petitioner by affirming the District Court decision to dismiss Petitioner's Complaint with prejudice and without discovery for lack of subject matter jurisdiction, and set aside the Petitioner's properly and timely filed Default entered by the Court Clerk, pursuant to Rule 55(a) of the Federal Rules of Civil Procedure in the Record against Defendant INTERNAL REVENUE SERVICE.

2. Whether federal law, and decisions of this Court do not provide federal officers with qualified immunity when the rights alleged to have been maliciously violated were clearly established at the time of the violation, and whether the Fifth Circuit Court of Appeals abused it's discretion and denied Fourth, Fifth, and Fourteenth Amendment Amendment Due Process to Petitioner by dismissing the Petitioner's Appeal, based on defendants qualified immunity?

3. Whether federal law, and decisions of this Court, prohibit State actors, i.e. corporations chartered under, and existing under color of State law from violating protected constitutional rights of citizens, since are no persons excepted in a 1983 action, therefore, is there immunity for State actors in their official and /or personal capacities?

4. Whether Petitioner can be sanctioned or punished for asking the courts to protect his rights, since Petitioner has been led to believe by previous court decisions, that the courts have a duty to protect his rights, and is this Court going to follow it's own mandate and liberally construe Petitioner's Petition,and protect Petitioner's rights, no matter how inartfully pleaded?

5. Whether the Petitioner may continue to move forward pursuant to his proper and timely filed Default entry pursuant to

Rule 55(a) of the Federal Rules of Civil Procedure in the Record of this case against defendant GARY O. BOOTH , personal capacity, since said Default entry was never argued by either the District Court or the Fifth Circuit Court of Appeals?

LIST OF PARTIES TO THE PROCEEDING

Robert Lee Avrett, Jr., *Petitioner*

POLY-AMERICA,INC.,STEVEN GRANT ROSS,STEVEN GRANT ROSS,personal capacity,JOAN M. TASKER, JOAN M. TASKER,personal capacity, WANDA WAKELAND, WANDA WAKELAND, personal capacity, and STEVEN C. MAHAFFEY, attorney for the POLY-AMERICA defendants

EDWARD M. CAVUTO, EDWARD M.CAVUTO, personal capacity, GARY O. BOOTH,GARY O. BOOTH, personal capacity, INTERNAL REVENUE SERVICE, JOHN DOES 1 through 3,JANE DOES 1 through 3, and RANDOLPH HUTTER, attorney for INTERNAL REVENUE SERVICE defendants,

Respondents

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II. Federal law, and decisions of this Court do not provide federal officers with qualified immunity when the rights alleged to have been maliciously violated were clearly established at the time of the violation.

III. Federal law, and decisions of this Court, prohibit State actors, i.e. corporations chartered under, and existing under color of State law from violating protected

constitutional rights of citizens, since are no persons excepted in a 1983 action.

IV. Whether federal courts , at any level are mandated by this Court to liberally construe In propria Persona pleadings in favor of the Pleader, regardless fo how inartfully pleaded, and can Petitioner be sanctioned or punished for asking the courts to protect his rights?

V. Whether the Petitioner may continue to move forward pursuant to his proper and timely filed Default entry pursuant to Rule 55(a) of the Federal Rules of Civil Procedure in the Record of this case against defendant GARY O. BOOTH , personal capacity, since said Default entry was never argued by either the District Court or the Fifth Circuit Court of Appeals?

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APPENDIX

Appendix A — Judgement of the United States Court of Appeals for the Fifth Circuit Filed March 14, 1997..... 1a

OPINION BELOW

Robert L. Avrett, Jr. Petitioner-Appellant, vs . POLY-AMERICA,INC.,STEVEN GRANT ROSS,STEVEN GRANT ROSS,personal capacity,JOAN M. TASKER, JOAN M. TASKER,personal capacity,WANDA WAKELAND, WANDA WAKELAND, personal capacity, EDWARD M. CAVUTO, EDWARD M.UTO,personal capacity,GARY O. BOOTH,GARY O. BOOTH,personal capacity, INTERNAL REVENUE SERVICE, JOHN DOES 1 through 3,JANE DOES 1 through 3, defendants / appellees. United States Court of Appeals for the Fifth Circuit, case numbers, 96-10174, 96-10382, 96-10692 Summary Calendar.

STATEMENT REGARDING JURISDICTION

Pursuant to Supreme Court Rule 14 .1. (e) (i) (iv), the grounds upon which jurisdiction of this Court is invoked pursuant to Supreme Court Rule 14 .1. (e) (l).

The date of judgement sought to be reviewed is March 14, 1997.

Pursuant to Supreme Court Rule 14 .1. (e) (iv), the statutory provision believed to confer on this Court jurisdiction to review judgement or decree in question by writ of certiorari is 28 U.S.C. Section 1254 (1).

To the best of Petitioner's knowledge and belief, there are no entries pursunat to Supreme Court Rule 14.1. (e) (ii) (iii).

STATUTES INVOLVED

26 USC Sec 7214(a), 18 USC Sections 1001.

CONSTITUTIONAL PROVISIONS INVOLVED

1. Fourth Article of Amendment to the Constitution for the united States of America, " The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated , and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing

the place to be searched, and the persons or things to be seized."

2. Fifth Article of Amendment to the Constitution for the united States of America, " No person shall be held to answer for capital , or other infamous crime, unless on a presentment or indictment of a Grand Jury, except in case arising in the land or naval forces , or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself,
nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

3. Fourteenth Article of Amendment to the Constitution for the united States of America. "...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This petition arises from a civil suit for damages suffered from violations of Petitioner's protected constitutional rights as a result of the named defendants who conspired, as State actors, the POLY-AMERICA defendants, in their official and personal capacities, along with the named federal defendants, INTERNAL REVENUE SERVICE,and the named officers and agents in their official and personal capacities who under color of law, and administrative regulation or abuse thereof, did by thier activities, which they knew or should have known violated Petitioner's protected constitutional rights. The complaint was dismissed with prejudice against all named defendfants, and all judgements of the district court were appealed to the Fifth Circuit Court of Appeals. The Fifth Circuit Court of Appeals substituted form for substance in order to affirm the district court's decisions. This decision by the district court and affirmation by the Fifth Circuit court of Appeals is in clear conflict with this supreme Court's rulings. Petitioner has filed a prima facia complaint against all named defendants for violation of protected united States

Constitutional rights. The prima facia case is outlined with specificity in the complaint, **and was not a challenge to the constitutionality of any statute**, since the question on the validity of federal or any other statute or administrative due process has clearly been laid to rest by this supreme Court and inferior courts with regard to constitutional violations by federal, since federal agencies and their agents are required by law to follow their administrative procedures, and failure to do so denies due process required by the Constitution. This Court on May 27, 1997 unanimously ruled that the President of the United States was not above the law, therefore , no agents below him in the Executive Branch could be immune from suit against them personally. Petitioner's claim against CAVUTO'S and BOOTH'S official capacities, is a claim against the entity they represent, the INTERNAL REVENUE SERVICE.

"Suits against officials in their official capacity are actually suits against the government entity they represent, while suits against government officials in their individual capacity are suits against only the individual.", **Brandon v. Holt**, 469 U.S. 464,105 S.Ct. 876, 83 L.Ed.2d 878 (1985), in CAVUTO and BOOTH'S individual capacities, they are not being sued as part of the INTERNAL REVENUE SERVICE. **Brandon v. Holt**, 469 U.S. 464,105 S.Ct. 876, 83 L.Ed.2d 878 (1985), The notion that the United States has not consented is irrelevant, since Petitioner has not sued the UNITED STATES in it's own name, regardless of any typographical errors in Petitioner's complaint and appeal.

The Respondent's brief and statement of facts clearly points out the Respondent's violations of Petitioner's constitutional rights. Petitioner named all respondents in his complaint and clearly pointed out violations of his protected constitutional rights, and it is clear in respondent's briefs by their pleadings, all respondents have agreed that they violated the Petitioner's constitutional rights, and respondents BOOTH, BOOTH, personal capacity, CAVUTO, CAVUTO, personal capacity, and INTERNAL REVENUE SERVICE even went so far to state in their brief, that there are no facts in dispute in this case, therefore, Petitioner has clearly stated a claim upon which relief can be granted. All respondents stated that they are immune, but fail to tell any Court or Petitioner under what law , statute, code or regulation how they are immune. The question of immunity, absolute or qualified, has been clearly established

by this Court in the cases cited in Petitioner's pleadings. Petitioner has never challenged the constitutionality of the income tax laws, but has only asserted violations of his constitutional rights. The united States Constitution does not allow violation of any protected constitutional right through any rule or legislation, as clearly enunciated by this Court in **Miranda v. Arizona** , 384 U.S. 436, pp. 491 . Therefore, Petitioner's complaint states a claim upon which relief can be granted.

Petitioner has demonstrated and Respondent's agree that they have violated a right secured by the Constitution. A review of Respondent's brief would lead Petitioner to believe Respondents could violate a constitutional right, be immune, and never be sued.

Respondent's have agreed in their brief and 12 (b)(6) Motion to Dismiss, that they have acted in concert and conspiracy with each other to violate Petitioner's Constitutional rights. Petitioner has not raised the issue of the constitutionality of the Internal Revenue Code, it would appear that Respondent's continue to believe Petitioner has no constitutional rights. Respondent's would make this Court believe that this case is in the same class as **Lonsdale v. Commissioner of Internal Revenue,** 661 F. 2d 71 (5th Cir.1981). It is clear at this point in their brief that Respondent's do not have a grasp of the charges at hand in the Petitioner's complaint, or the protected rights guarateed by the Constitution. Respondent's have continually pointed out in their brief that they should be immune because they were just doing what they were told. It is clear in the actions of the inferior courts that the courts have failed either by design or ignorance to perform their duty so clearly stated in **Procunier v. Martinez** , 416 U.S. 396 (1974), to protect constitutional rights. Petioner now asks this Court to protect his constitutional rights.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

This action is brought in the court of first instance pursuant of 42 USC Section 1983, 1985, 1986,1988,and the Fourth, Fifth, and Fourteenth Amendments to the Constitution for the united States of America. Petitioner evoked the jurisdiction of the court of first instance pursuant to Title 28 USC Section 1331, and 28 USC Section 1343,(a) (3) (4).

REASONS FOR GRANTING THE WRIT.

I. **Federal law , as well as clearly established decisions of this Court provide redress for Citizens, and subject matter jurisdiction to federal district courts when citizens sue federal officers for monetary damages when federal officers violate a citizens constitutional rights, and dismissal cannot be used for it's convenience, to protect fellow federal employees.**

See 26 USC Sec 7214(a), 18 USC Sections 1001. In **Bivens v.Six Unknown Named Agents of the Federal Bureau of Narcotics.** 403 U.S. 388, (1971), in which this Court established that a citizen suffering a compensible injury to a constitutionally protected interest could invoke the general federal-question jurisdiction of the district courts to obtain an award of monetary damages against the responsible federal official. As Mr. Justice Harlan, concurring in the judgement, pointed out, the action for damages recognized in **Bivens** could be a vital means of providing redress for persons whose constitutional rights have been violated. This Court declared injunctive or declaratory relief useless to a person already

injured, " For people in Bivens' shoes, it is damages or nothing." **403 U.S., at 410.** This Court held in **Bivens** , supra, that actions for civil rights violations against federal personnel can be brought under 28 USCS Section 1331. The Third Circuit similiarly held in **Bethea v. Reid**, 445 F. 2d 1163,1164, cert. denied 404 U.S.1061, 30 L. Ed 749, 92 S. Ct. 747, "It is now clear that a damage action lies for violations by federal officers of rights guaranteed by the Fourth Amendment." Other federal Courts have held that Fourth Amendment rights are protectable against federal personnel under the "Bivens Doctrine." See also **Williams v. Rogers**, 449 F2d 513, cert. denied 405 U.S. 926, 30 L. Ed. 2d 799d, 92 S. Ct. 976. Further, that Plaintiff's complaint failed to overcome Defendant's qualified immunity by pleading factually and with specificity , when Petitioner is only required to plead allegations pursuant to clearly esatablished law by this supreme Court in **Leatherman v. Tarrant Co. Narcotics Intelligence and Coordination Unit, No. 91-1657 (U.S. March 3, 1993).** The complaint was dismissed with prejudice prior to any discovery or hearing contrary to **Haines** V. **Kerner**, 404 US 519, 30 Led2d 652, 92 Sct 594 (1972), **Boag V. Mac Dougall**, 454 US 364, 70 Led2d 551, 102 Sct. 700 (1982), **Good v. Allain** , 823 F2d 64 (5th Cir.1987). Petitioner believes the inferior courts do not allow discovery, in an effort to protect fellow federal employees when their actions violate a citizen's protected constitutional rights, where discovery would clearly show the actions of Respondents. As far as dismissal is concerned, in **Cooper v. Pate**, 378 U.S. 546 (1964), **Cramer v. Skinner**, 931 F2d 1020(5th Cir. 1991), and **Hamm v. Groose**, 15 F3d 110 (8th Cir. 1994), Court must accept allegations in pleadings as true. In adressing the issue of discovery, which was not allowed in this case, it is disquieting to see the Fifth Circuit affirming the decision of the district court to dismiss without discovery, when the Fifth Circuit ruled in **Banco De Credito Indus, Sa v. Tesoraria General**, 990 F2d 827 (5th Cir. 1993), that Federal Rules of Civil Procedure contemplate that parties will be afforded adequate time to conduct necessary discovery. The question that comes to mind is does the Fifith Circuit always talk out of both sides of it's mouth , or is there a separate, esoteric set of rules and laws the Fifth Circuit applies to complaints and appeals like the ones of Petitioner, and why do the wealthy plaintiffs represented by the elite legal brethren of the court receive a more palatable fruit of the tree?

The United States District Court for the Northern District of Texas in setting aside clerk's entry of Default against Defendant IRS, and the United States Circuit Court for the Fifth Circuit in affirming the district dourt's decision, is now resorting to outright retaliation and is attempting to protect government entities and agents by ignoring completely, the clearly established law. The district dourt and circuit courts in their orders and judgements have ignored all the cases cited herein by the Petitioner regarding how Petitioner is not reqired to be held to the same standards as an attorney. Petitioner in the instant case has exercised what he believes to be due diligence in his good faith attempt to follow the Rules. Accordingly, the Default entry should not be set aside for the reasons listed below:

1. Defendant INTERNAL REVENUE SERVICE was personally served pursuant to Federal Rules of Civil Procedure and had the ample time allowed under these rules to respond, and INTERNAL REVENUE SERVICE did not respond in the 60 day period allowed. The INTERNAL REVENUE SERVICE did respond out of time, the untimely response is in the record of this case.

2. The local United States Attorney was personally served under the Federal Rules of Civil Procedure and had the ample time allowed to respond, and the district court's order setting aside the default entry claiming the return of service does not reflect how service was accomplished is not true, since the name of server, address of server, signature of server, the date, how service was accomplished, and the individual to whom service was made to are all included in the return of service, in the recored of this case.

3. Attorney General Janet Reno was served pursuant to the Federal Rules of Civil Procedure and had the ample time allowed to respond.

4. Defendant GARY O. BOOTH was personally served in his official and personal capacities pursuant to Federal Rules of Civil Procedure in his official and personal capacity and had the ample
time allowed to respond. BOOTH, in his personal capacity did not respond.

5. Defendant EDWARD M. CAVUTO was personally served pursuant to Federal Rules of Civil Procedure in his official capacity and had the ample time to respond. A review of the Record in this case of the services will show that the UNITED

STATES ATTORNEY GENERAL, the local UNITED STATES ATTORNEY, INTERNAL REVENUE SERVICE, GARY O. BOOTH, GARY O. BOOTH,personal capacity, EDWARD M. CAVUTO, EDWARD M. CAVUTO, personal capacity well knew there was properly effected service of a complaint and an answer was required, but INTERNAL REVENUE SERVICE and GARY O. BOOTH, personal capacity failed to timely respond. The actions of the District and Circuit Courts in this instant case would only serve to chill further attempts of Petitioner or any other non-lawyer to use the courts to protect their constitutional rights. " No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government , from the highest to the lowest, are creatures of the law, and are bound to obey it.", **United States v. Lee** , 106 U.S., at 220.

II. Federal law, and decisions of this Court do not provide federal officers with qualified immunity when the rights alleged to have been maliciously violated were clearly established at the time of the violation.

Petitioner's rights which were violated by all named defendants, were clearly existing at the time of the violations. "The individual may stand upon his constitutional rights as a citizen. He is entitled to carry on his private business in his own way.His power to contract is unlimited. He owes no duty to the State or to his neighbors to divulge his business, or to open his doors to an investigation so far as it may tend to incriminate him. He owes no such duty to the State, since he receives nothing therefrom, beyond the protection of his life and property. ***His rights are such as existed by the law of the land long antecedent to the organization of the State, and can only be taken from him by due process of law,in accordance with the Constitution.*** Among his rights are a refusal to incriminate himself, and the immunity of himself and his property from arrest or seizure except under a warrant of the law. He owes nothing to the public so long as he does not trespass upon their Rights. **Hale v. Henkel, 202 U.S.43. (1906)** (emphasis added).

"Since an unconstitutional act, even if authorized by statute, was viewed as not authorized in contemplation of law , there could be no immunity defense." **Butz v. Economou** , 438 U.S. 478 (1978). In **Neely v. Feldstein,** 55 F. 3d 1502 (9 th Cir. 1995), the decision was, "Standard for denying qualified immunity in civil civil rights action involves two-part analysis: whether law governing official's conduct was clearly established, and whether reasonable officer could have believed that conduct was unlawful under the law." This test was never applied by either inferior court or pleaded by any defendant. In **Jones v. Counce**, 7 F.3d 1359 (8th Cir. 1993), and in **Benitez v. Wolff**, 985 F. 2d 662 (2nd Cir. 1993), the Courts stated "Qualified immunity defense fails if public officer violates clearly established right because a reasonably competent official should know the law governing this conduct." In **Mendenhall v. Goldsmith**, 59 F3d 685 (7th Cir. 1995), the court stated, For purposes of immunity analysis, federal officials are indistinguishable from state officials and receive no greater degree of protection from constitutional claims. The dismissal of defendants in this instance based on qualified immunity is obviously blatant ignorance or retaliation, since the supreme Court's ruling in **Bivens v.Six Unknown Named Agents of the Federal Bureau of Narcotics.** 403 U.S. 388, (1971). See also Federal Rules of Civil Procedure 8 (e)(1). The district court Judge in his order cites **Gipson v.Rosenberg**, and **Henzel v. Gerstein** , which were both overturned by this supreme Court of the United States in **Leatherman,** and the inferior courts citing **Schultea v. Wood**, 47 F. 3d 1427 (5th Cir.1995, is contrary to the supreme Court in **Leatherman** . In **Schultea** , the issue was the Plaintiff's substantive rights as an employee, this is not the issue in this Petitioner's complaint and appeal, and is totally irrelevant, incompetent, and immaterial .

III. Federal law, and decisions of this Court, prohibit State actors, i.e. corporations chartered under, and existing under color of State law from violating protected constitutional rights of citizens, since are no persons excepted in a 1983 action.

In **Miranda v. Arizona** , 384 U.S. 436, pp. 491, Chief Justice Warren wrote in the majority opinion, "where rights secured by the constitution are involved, there can be no rule making or legislation which would abrogate them. The Fourteenth Amendment brings this restraint down to the State level. " This apparently applies to all, including corporate entities chartered , and existing under color of state law and regulation, see **Hale v. Henkel, 202 U.S.43. (1906)**, in which this Court stated that corporations chartered under state law are state citizens for purposes of federal court jurisdiction. There are no exceptions mentioned in 42 U.S.C. Section 1983.

IV. Whether federal courts , are mandated by this Court to liberally construe In propria Persona pleadings in favor of the Pleader, regardless of how inarftfully pleaded in this instance, and can Petitioner be sanctioned for asking courts to protect his Rights?

This Court held in **Haines v. Kerner**, 404 U.S.(519), "...complaints are held to less stringent standards than formal pleadings by lawyers." "In determining whether such constitutional rights were denied, we are governed by the substance of things, not by mere form." **Louisville N.R. Co. v. Schmidt**, 177 U.S. 23 S. Ct. 620. In **Gideon v. Wainwright**, 372 U.S. 335, this Court held "...Laymen cannot be expected to know how to protect their rights when dealing with carefully practiced adversaries, and in **Brotherhood of Railroad Trainmen v. Virginia ex. Rel. Virginia State Bar**, 377 U.S. 1, 7, "...and for them to associate together to help one another to preserve and enforce rights granted them under federal laws cannot be condemned as a threat to legal ethics." "The court's determination must be reviewed simply from the allegations of the complaint construed most favorably to the pleader." **Scheuer v. Gibson**, 355 U.S. 232 (1974). "Thus it is immaterial whether the plaintiff is likely to prevail on the merits, or whether the plaintiff's requested relief is inappropriate, or that legal theories have been mischaracterized." **Holt Civic Club v. City of Tuscaloosa**, 439 U.S.60. This Court in **Gomez v. Toledo**, 446 U.S. 635, said that qualified immunity is an affirmative defense that must be raised by the defendant, and further that the plaintiff

is not required to anticipate the defense in his complaint. The point is the complaint/petition is a presentment containing presumptions. According to the rules of court and rules of evidence the allegations are presumed to be true, see **Neitzke v. Williams**, 109 S. Ct. 1827, "The court will presume all factual allegations of the complaint as true." With all the above cases cited, it is clear that a complaint need not plead facts, see **Palmer v. Board of Education Community Unit School District**, 46 F. 3d 682 (7th Cir. 1995). In **Moore v. McDonald**, 30 F3d616 (5th Cir.1994), the court decided that civil rights complaints are to be liberally construed.

Pursuant to Supreme Court Rule 10 .1. (c), the United States Court of Appeals, Fifth Circuit, has decided a federal question in a way that conflicts with applicable decisions of this Court. The United States Court of Appeals , Fifth Circuit, has ignored apllicable decisions of this Court in affirming the District Court's decision to dismiss Petitioner's complaint based on subject matter jurisdiction, **Bivens v.Six Unknown Named Agents of the Federal Bureau of Narcotics.** 403 U.S. 388 (1971), and **Butz v. Economou** , 438 U.S. 478 (1978). The inferior courts in this instance have also ignored applicable decisions of this Court based on a claim upon which relief can be granted. See **Marbury v. Madison** , 1 Cranch 137, 163 (1803), and **Bivens v.Six Unknown Named Agents of the Federal Bureau of Narcotics.** 403 U.S. 388 (1971), "Since an unconstitutional act, even if authorized by statute, was viewed as not authorized in contemplation of law , there could be no immunity defense." **Butz v. Economou** , 438 U.S. 478 (1978). Taking of private property without just compensation or due process, is absolutely repugnant to the Constitution. To repeat this Court in **Butz v. Economou** , 438 U.S. 478 (1978), " Surely *federal* officials should enjoy no greater zone of protection when they violate *federal* constitutional rules than do *state* officers.", and " To create a system in which the Bill of Rights monitors more closely the conduct of state officials than it does of federal officials is to stand the constitutional design on it's head."

V. Whether the Petitioner may continue to move forward pursuant to his proper and timely filed Default entry pursuant to Rule 55(a) of the Federal Rules of Civil Procedure in the Record of this case

against defendant GARY O. BOOTH , personal capacity, since said Default entry was never argued by either the District Court or the Fifth Circuit Court of Appeals?

Respondent GARY O. BOOTH, personal capacity was personally served on January 1, 1996,and GARY O. BOOTH, personal capacity failed to timely respond to the summons on January 21, 1996. Accordingly, Clerk's Entry of Default was properly made on January 23, 1996, pursuant Federal Rules of Civil Procedure 55(a). The Entry of Default against GARY O. BOOTH, personal capacity has never been argued, or addressed by either inferior court or by GARY O. BOOTH, personal capacity.

Petioner's question to this Court is; Can Petioner move forward in regards to said Entry of Default?

CONCLUSION

The supreme Court should grant the Petition for Writ of Certiorari. The decision of the United States Court of Appeals for the Fifth Circuit, conflicts with all the supreme Court decisions, cited by the Petitioner in this Petition, and Petitioner's complaint and appeals. Moreover, the question of the administration of the procedures in which the Respondents misused as a convenience, and subsequently damaged Petitioner, presents an important federal question which should be settled by the Supreme Court.

Respectfully submitted,

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APPENDIX A — JUDGEMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED MARCH 14, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-10174
No. 96-1-382
No. 96-10692
Summary Calendar

ROBERT L. AVRETT, JR.,

Plaintiff-Appellant,

versus

POLY-AMERICA, INC.; STEVEN GRANT ROSS; JOAN M. TASKER; WANDA WAKELAND; JOHN DOES 1-3; JANE DOES 1-3,

Defendants-Appellees,

EDWARD M. CAVUTO; GARY O. BOOTH; INYERNAL REVENUE SERVICE; JOHN DOES 1-3; JANE DOES 1-3,

Defendants-Appellees.

Appeal from the United States District Court
For the Northern District of Texas
USDC No. 4 : 95 -CV - 803 - A

Before HIGGINBOTTOM, WIENER, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Robert L. Avrett, Jr., appeals the district court's dismissal of his action against Poly-America, Inc., and its employees, Steven Grant Ross, Joan M. Tasker, and Wanda Wakeland; the Internal Revenue Service and its employees, Edward M. Cavuto and Gary O. Booth; John Does 1-3 and Jane Does 1-3 for lack of subject matter jurisdiction anf for failure to state a claim upon

which relief may be granted pursuant to Fed. R. Civ. P. 12 (b)(1) and 12 (b)(6). He argues that defendants violated his Fourth , Fifth and Fourteenth Amendment rights by issuing and honoring levies against his wages for income tax deficiencies. He argues that the district court failed to liberally construe his complaint and erred in ordering him to file an amended complaint asserting the facts supporting his claim against Cavuto and Booth in their individual capacities. We have reviewed the record and the district court's opinions and find no reversible error. Accordingly, we affirm for essentially the same reasons given by the district court. Avrett v. Poly-America, Inc., et al. , Nos. 4:95-CV-803-A (Feb. 6, 1996, March 26, 1996, and April 9, 1996).

Avrett's appeal is without arguable merit and is thus frivolous. See Howard v. King , 707 F. 2d 215, 219-20 (5th Cir. 1983). Accordingly, Avrett's appeal is DISMISSED. 5th Cir. R.42.2. Avrett is cautioned that future frivolous civil suits and appeals filed by him or on his behalf will invite the imposition of sanctions. Avrett is cautioned further to review any pending suits and appeals to ensure that they do not raise arhuments that are frivolous .

APPEAL DISMISSED; SANCTION WARNING ISSUED.

* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

***Please note: Howard v. King , 707 F. 2d 215, 219-20 (5th Cir. 1983), in which the Fifth Circuit decided to vacate the district court's decision which was identical to Petitioner's complaint and appeals. Why would the Fifth Circuit ignore it's own decision?**

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

(1)

In the

supreme Court of the United States

October 1996 Term

Robert Lee Avrett, Jr.,

Petitioner

vs.

POLY-AMERICA,INC., STEVEN GRANT ROSS, STEVEN GRANT ROSS,personal capacity, JOAN M. TASKER, JOAN M. TASKER,personal capacity, WANDA WAKELAND, WANDA WAKELAND, personal capacity,EDWARD M. CAVUTO,EDWARD M. CAVUTO,personal capacity, GARY O. BOOTH, GARY O. BOOTH,personal capacity, INTERNAL REVENUE SERVICE, JOHN DOES 1 through 3, JANE DOES 1 through 3,

Respondents

Petition for Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

SUPPLEMENTAL APPENDIX

Robert Lee Avrett, Jr.
714 E. Wall St. #106
Grapevine, Texas 76051
(817) 481-0237

10 pp

LIST OF PARTIES TO THE PROCEEDING

Robert Lee Avrett, Jr., *Petitioner*

POLY-AMERICA,INC.,STEVEN GRANT ROSS,STEVEN GRANT ROSS,personal capacity,JOAN M. TASKER, JOAN M. TASKER,personal capacity, WANDA WAKELAND, WANDA WAKELAND, personal capacity, and STEVEN C. MAHAFFEY, attorney for the POLY-AMERICA defendants

EDWARD M. CAVUTO, EDWARD M.CAVUTO, personal capacity, GARY O. BOOTH,GARY O. BOOTH, personal capacity, INTERNAL REVENUE SERVICE, JOHN DOES 1 through 3,JANE DOES 1 through 3, and RANDOLPH HUTTER, attorney for INTERNAL REVENUE SERVICE defendants,

Respondents

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ROBERT L. AVRETT, JR. Plaintiff,	)	
VS.	)	NO. 4:95-CV-803-A
POLY-AMERICA, INC., ET AL, Defendants	)	

ORDER

Came on for consideration the motion of defendants Poly - America, Inc., Steven Grant Ross, Joan M. Tasker, and Wanda Wakeland ("movants") to dismiss. The court, having considered the motion, the response of plaintiff, Robert L. Avrett, Jr., titled "Plaintiff's Motion to Strike Defendants' 12(b)(6) Motion and Memorandum of Law", the record, and applicable authorities, finds that the motion should be granted. The court further finds that there is no necessity for a hearing and is, therefore, denying plaintiff's motion for hearing.

Although plaintiff attempts to argue to the contrary, his claims against movants are clearly based on their having honored levies issued by the Internal Revenue Service. Plaintiff maintains that his constitutional rights were violated by movants having honored the levies. As the Fifth Circuit has noted, the constitutionality of the income tax laws has been consistently upheld and the tax levy ptocedure in Internal Revenue Code $ 6331 does not violate due process. Burroughs v. Wallingford, 780 F 2d 502, 503 (5th Cir.1986). Movants are immune from liability to plaintiff for complying with the levies. Id. Accordingly, movants' motion to dismiss will be granted.

The court ORDERS that movant's motion to dismiss be, and is hereby, granted and that plaintiff's claims against them be, and are hereby dismissed with prejudice. The court further ORDERS that plaintiff's motion to strike defendants' motion and motion for hearing be, and are hereby denied.

The court determines that there is no reason for delay in, and hereby directs, entry of final judgement as to the dismissal of plaintiff's claims against movants.

SIGNED February 6, 1996

JOHN McBRIDE
United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ROBERT L. AVRETT, JR. Plaintiff,	)	
VS.	)	NO. 4:95-CV-803-A
POLY-AMERICA, INC., ET AL, Defendants	)	

FINAL JUDGEMENT AS TO DEFENDANTS
POLY-AMERICA, INC., STEVEN GRANT ROSS, JOAN M. TASKER, AND WANDA WAKELAND

In accordance with the court's order of even date herewith,
The court ORDERS, ADJUDGES, and DECREES that the claims of plaintiff, Robert L. Avrett, Jr., against defendants Poly-America, Inc., Steven Grant Ross, Joan M. Tasker, and Wanda Wakeland be, and are hereby dismissed with prejudice.
The court further ORDERS, ADJUDGES and DECREES that said defendants have and recover their court costs from plaintiff.

SIGNED February 6, 1996

JOHN McBRIDE
United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ROBERT L. AVRETT, JR.)
Plaintiff,)
VS.) NO. 4:95-CV-803-A
POLY-AMERICA, INC., ET AL,)
Defendants)

O R D E R

Came on for consideration the motion of defendants Edward M. Cavuto ("Cavuto"), Gary O. Booth ("Booth"), and Internal Revenue Service ("IRS") to dismiss. The court interprets the motion to strike filed by plaintiff, Robert L. Avrett, Jr., on March 14, 1996, to be a response to the motion to dismiss. Having considered the motion, the response, the record, and applicable authorities, the court finds that the motion should be granted in part.

Plaintiff's claim in this action arises out of the issuance of levies by IRS. Apparently the notices of levy were signed by Cavuto. Booth was the district director of IRS at the time the levies were issued. Plaintiff alleges generally that these defendants and others, the claims against whom have already been dismissed , conspired in some manner to deprive plaintiff of certain rights under the Constitututions of the United States and the State of Texas.

Movants maintain that the court lacks jurisdiction over this action and that , in any event, Cavuto and Booth are entitled to qualified immunity. Despite his protestations to the contrary, plaintiff's claims against Cavuto and Booth in their official Capacities and against IRS are actually claims against United States of America. Hawaii v. Gordon, 373 U.S.57, 58(1963). Plaintiff has not made any attempt to show that the United States has expressly consented to be sued. See Lehman v. Nakshian, 453 U.S. 156, 160 (1981); United States v. Mitchell, 445 U.S.535, 538 (1980). Indeed, plaintiff maintains that he is not suing the United States. Plaintiff's motion to strike, at 7, 19. Accordingly, to the extent that plaintiff's complaint could be interpreted as including claims against the United States, such claims will be dismissed.

As for plaintiff's clains against Cavuto and Booth in their individual capacities, the court finds that plaintiff should be given

an opportunity to replead to state those claims with requisite specificity. The conclusory allegations of plaintiff's complaint are insufficient to overcome the defense of qualified immunity. See Schultea v. Wood, 47 F 3d 1427 (5th Cir. 1995); Gipson v. Rosenberg, 797 F 2d 224, 226 (5th Cir. 1986), cert. Denied, 481 U.S. 1007 (1987); Henzel v. Gerstein, 608 F. 2d 654, 659 (5th Cir. 1979).

The record reflects that, on February 27, 1996, the clerk entered default against IRS at plaintiff's request. At the time the default was entered, the record did not reflect that said defendant had been properly served with the summons and complaint as required by Fed.R.Civ. P. (4) (I). In particular, the record did not show that service on IRS had been effected "by also sending a copy of the summons and of the complaint by registered or certified mail" to IRS. See Fed. R. Civ.P. 4 (I)(2). The court further notes that the return apparently intended to comply with Fed. R. Civ. P. 4 (I) (1) (A) reflects that it was directed to "United States Assistant Attorney General" and does not reflect how service was accomplished. Accordingly, default should not have been entered. See Fed. R. Civ.P. 55 (a). The court will set the default aside.

The court ORDERS that:

(1) The clerk's February 27, 1996, entry of default against IRS be, and is hereby, vacated and set aside;

(2) The motion to dismiss be, and is hereby, granted in part and plaintiff's claims against Cavuto and Booth in their official capacities and agqainst IRS be, and are hereby, dismissed;

(3) The motion to dismiss be, and is hereby, otherwise denied;

(4) By 4:30 p.m. on April 5, 1996, plaintiff file an amended complaint alleging with particularity all material facts on which he contends he will establish his right to recovery from Booth and Cavuto in their individual caapcities and which will include detailed facrs supporting the contention that their pleas of immunity cannot be sustained; and

(5) Plaintiff's motion to strike be, and is hereby, denied.

The court determines that there is no just reason for delay, and hereby directs, entry of final judgement as to the

dismissal of plaintiff's claims against Booth and Cavuto in their official capacities and against IRS.

SIGNED March 26 , 1995

JOHN McBRIDE
United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ROBERT L. AVRETT, JR.	)	
Plaintiff,	)	
VS.	)	NO. 4:95-CV-803-A
POLY-AMERICA, INC., ET AL,	)	
Defendants	)	

O R D E R

By order signed March 26, 1996, the court dismissed the claims of plaintiff, Robert L. Avrett, Jr., against defendant Internal Revenue Service and against defendant Edward M. Cavuto ("Cavuto") and Gary O. Booth ("Booth") in their official capacities. That left only plaintiff's claims against Cavuto and Booth in their individual capacities for determination. The court ordered that, by 4:30 p.m. April 5, 1996, plaintiff file an amended complaint alleging with particularity all material facts on which he contends he will establish his right to recovery from Booth and Cavuto in their individual capacities, including detailed facts supporting the contention that their pleas of immunitycould not be sustained. To date, plaintiff has failed to comply with the court's March 26 order. Plaintiff has either abandoned his claims or has stated his best case in his original complaint. The conclusory allegations of plaintiff's complaint, however, are insufficient to overcome the defense of qualified immunity. Accordingly, the court finds that plaintiff's against Booth and Cavuto in their individual capacities should be dismissed.

The court ORDERS that plaintiff's claims against Booth and Cavuto in their individual capacities be, and are hereby dismissed with prejudice.

SIGNED April 9, 1996

JOHN McBRIDE
United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ROBERT L. AVRETT, JR.	)	
Plaintiff,	)	
VS.	)	NO. 4:95-CV-803-A
POLY-AMERICA, INC., ET AL,	)	
Defendants	)	

FINAL JUDGEMENT

In accordance with the court's order of even date herewith,

The court ORDERS that the claims of the plaintiff, Robert L. Avrett, Jr., against defendants Edward M. Cavuto and Gary O. Booth in their individual capacities be, and are hereby dismissed with prejudice. The court further ORDERS, ADJUDGES and DECREES that these defendants have and recover their court costs from plaintiff.

SIGNED April 9 , 1996

JOHN McBRIDE
United States District Judge